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Fifty-seventh session
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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms

Note by the secretariat

1. At its fifty-sixth session, the Commission on Human Rights adopted resolution 2000/41, entitled "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms".

2. In paragraph 2 of the resolution, the Commission requested the Secretary-General to circulate to all Member States the text of the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law", annexed to the final report of the independent expert (E/CN.4/2000/62) and to request that they send their comments thereon to the Office of the United Nations High Commissioner for Human Rights.

3. In paragraph 3, the Commission requested the High Commissioner to hold a consultative meeting in Geneva for all interested Governments, intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council, using available resources, with a view to finalizing the principles and guidelines on the basis of the comments submitted.

4. Accordingly, a note verbale inviting all Member States to submit their comments on the basic principles and guidelines annexed to the report of the independent expert was sent out on 31 August 2000. As at 20 November 2000, replies have been received from six States. These replies may be consulted by approaching the secretariat.

5. The Office of the High Commissioner believes that, in order to ensure that the consultative meeting produces good results, it is important to have as many comments on the basic principles and guidelines as possible. Therefore, on 23 November 2000, the secretariat has sent out a second note verbale inviting those Member States which have not yet submitted their comments to the Office of the High Commissioner for Human Rights, to do so at their earliest convenience.

6. Any additional information on this matter will be brought to the attention of the Commission on Human Rights in an addendum to the present document.

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COMMISSION ON HUMAN RIGHTS
Fifty-seventh session
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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

Report of the High Commissioner for Human Rights

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GE.01-10026 (E)

Introduction

1. At its fifty-second session, in resolution 1996/16, the Commission on Human Rights took note of the measures taken by the Committee on Economic, Social and Cultural Rights towards the elaboration of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights establishing the right of individuals or groups to submit communications concerning non-compliance with the Covenant, as recommended by the World Conference on Human Rights, and requested the Committee to submit a report on the matter to the Commission at its fifty-third session.

2. The Committee on Economic, Social and Cultural Rights concluded its consideration of a draft optional protocol at its fifteenth session (E/C.12/1996/SR.44-49 and 54). The report of the Committee on Economic, Social and Cultural Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex) was submitted to the Commission on Human Rights for consideration at its fifty-third session, in 1997.

3. Comments on the subject received pursuant to Commission decision 1997/104 and resolutions 1998/33 and 1999/25 were reproduced in documents E/CN.4/1998/84 and Add.1, E/CN.4/1999/112 and Add.1, and E/CN.4/2000/49.

4. In paragraph 7 (b) of its resolution 2000/9, the Commission on Human Rights requested the High Commissioner to invite all States, intergovernmental organizations and non-governmental organizations which had not yet done so to submit their comments on the report by the Committee on Economic, Social and Cultural Rights on a draft optional protocol for the consideration of communications in relation to the Covenant (E/CN.4/1997/105, annex), as well as to invite all States to submit their comments on the options relating to the proposal for a draft optional protocol, contained in the report of the High Commissioner for Human Rights on the draft optional protocol to the Covenant (E/CN.4/2000/49), or to propose any other option that would be conducive to a substantive dialogue, giving due regard to the respective roles of the Committee and the Sub-Commission on the Promotion and Protection of Human Rights.

5. Consequently, a note verbale was sent by the secretariat on 10 July 2000 to States parties, and a letter on 24 August 2000 to intergovernmental and non-governmental organizations, requesting comments on the report of the Committee on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex), as well as on the options contained in the report of the High Commissioner for Human Rights (E/CN.4/2000/49).

6. As at 25 November 2000, comments have been received from: Mauritius, Norway, Portugal, the International Monetary Fund, the World Bank, the Food and Agriculture Organization of the United Nations, the Centre on Housing Rights and Evictions (COHRE), the International Anti-Poverty Law Center, Forum Menschenrechte, the American Association of Jurists and Centre Europe-Tiers Monde, the International Commission of Jurists and Habitat International Coalition (HIC), and the Netherlands Institute of Human Rights.

7. The present report contains the substantive parts of the replies received. The full text of the replies may be consulted in the files of the secretariat. Any additional comments received will be reflected in an addendum to the present report.

8. Pursuant to paragraph 7 (f) of Commission on Human Rights resolution 2000/9, encouraging the Office of the High Commissioner for Human Rights to strengthen the research and analytical capacities of her Office in the field of economic, social and cultural rights, and to share her expertise, inter alia, through the holding of expert meetings, the Office is supporting the organization on 5 and 6 February 2001 in Geneva of a workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. This workshop, organized in cooperation with the International Commission of Jurists, will be attended by government representatives, as well as representatives of intergovernmental and non-governmental organizations, scholars and experts in the field of economic, social and cultural rights. The proceedings of the workshop will be reproduced in an addendum to the present report.

I. COMMENTS ON THE REPORT OF THE COMMITTEE

A. Comments of States

Mauritius

[Original: English]
[16 November 2000]

9. The Government of the Republic of Mauritius:

(a) Welcomes the principle of an individual communications procedure under the International Covenant on Economic, Social and Cultural Rights and believes that individuals will thus familiarize themselves better with their rights under the Covenant with a view to seeking redress directly. It is to be noted that Mauritian nationals have, on some occasions, availed themselves of the individual complaints procedure under the International Covenant on Civil and Political Rights;

(b) Agrees with the idea that communications should be received from groups as well as individuals, but believes that third parties should be allowed to act on behalf of alleged victims in very limited circumstances, for example, only with the express consent of the alleged victim; and

(c) May make further comments in due course.

Norway

[Original: English]
[15 November 2000]

10. The Government of Norway attaches high priority to the realization of economic, social and cultural rights, and finds that the availability of an individual complaints procedure will

strengthen the legal status of those involved. The responsibility for implementing and providing a legal response to the Covenant lies with the State. However, the availability of international legal protection would be for many an important addition.

11. The Government of Norway furthermore supports the work to establish a complaints procedure on the basis of the principle of the indivisibility, interdependence and interrelatedness of human rights. The establishment of a complaints procedure, similar to the one existing for the International Covenant on Civil and Political Rights, would be a structured and concrete affirmation of this principle. It would also be a step towards strengthening economic, social and cultural rights. In this connection, we would like to mention that Norway last year adopted a national human rights law incorporating the two Covenants.

12. The Government of Norway continues, however, to be concerned about the resource constraints of the human rights mechanisms and the limited capacity of the Committee on Economic, Social and Cultural Rights, which may be further stretched by the additional task of reviewing individual complaints. We hope the extraordinary third session of the Committee this year could become part of the yearly cycle.

13. Furthermore, we would like to encourage the Committee to continue to elaborate General Comments and to interact with other human rights special mechanisms and other treaty bodies. These are all valuable efforts that enhance the legal precision and interpretation of the Covenant, clarify the obligations of the ratifying State party and eventually strengthen the Committee's ability to handle a complaints procedure.

14. The Government of Norway will not at this stage comment on the draft text of the optional protocol. We would, however, like to recall the Committee's analytical paper emphasizing that the State party concerned under an optional protocol retains the final decision as to what will be done in response to any views adopted by the Committee. The interpretation and application of an optional protocol will follow the principle of the progressive realization of the rights applied to many of the Covenant's articles. The important issue will be to consider if the ratifying State party has done what is possible according to its means to meet its obligations in relation to each individual/group. We would in this context encourage continued work to develop indicators and benchmarks. Hence we support the plans to arrange a seminar on indicators and benchmarks in the context of next year's anniversary of the Covenant.

Portugal

[Original: English]
[6 November 2000]

15. The comments of Portugal concerning the main questions arising from the elaboration and adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, with the aim of creating the possibility of presenting complaints in cases of alleged violations of the Covenant, concern the following questions:

(i) The subject of the complaints the Committee would examine;

(ii) Who has the capacity to present an individual complaint?

(iii) What range of rights is covered by the system of individual complaints?

(iv) What are the conditions for the admission of an individual complaint?

(v) Shall the possibility of decreeing interim measures be established?

(vi) Possibility of solving a certain case through friendly settlement;

(vii) Time limit for the State to answer to the information it has received;

(viii) Way according to which the proof shall be examined;

(ix) Receivability and admissibility.

16. The first question, relating to the scope of the Committee's competence, has to do with the subject of the complaints, namely whether the Committee shall pronounce itself on cases of "violations" of the Covenant, or may examine cases alleging unsatisfactory application of the Covenant. The Additional Protocol to the European Social Charter, which Portugal has ratified, provides this second and broader option. However, the Committee on Economic, Social and Cultural Rights prefers the more restrictive concept of "violations", which has the advantage of being in line with the language of the Optional Protocol to the International Covenant on Civil and Political Rights and which avoids a State party becoming the subject of an individual complaint because it has not ensured the full enjoyment of a certain right. Portugal is thus of the opinion that the more restrictive and more prudent perspective could be adopted concerning an optional protocol to the International Covenant on Economic, Social and Cultural Rights, giving the Committee competence to examine solely cases of violations of the Covenant.

17. Concerning the question of who shall have the capacity to present an individual communication, Portugal is of the opinion that this possibility shall be extended not only to individual victims of violations of their rights, but equally to organizations which have been victims of violations of their rights. The opening up of the field of application of the Committee's action to organizations is not of great significance, given the fact that there are few organizations which may allege to be victims of violations of economic, social and cultural rights.[1] We thus welcome the following drafting suggestion:[2]

> "Any individual or group claiming to be a <u>victim of a violation</u> of any of the rights recognized in the Covenant may submit a written communication to the Committee for examination."

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[1] Under the Additional Protocol to the European Social Charter, only organizations listed in article 1 thereof can submit individual complaints.

[2] E/C.12/1994/12, 9 November 1994, para. 20.

18. This drafting suggestion is in fact very close to article 25, paragraph 1, of the European Convention on Human Rights, according to which:

> "The Commission may receive petitions ... from any person, non-governmental organization or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties."

19. Concerning the range of rights covered, Portugal is of the opinion that the optional protocol shall apply to all the rights contained in articles 1 to 15 of the International Covenant, that is all the economic, social and cultural rights contained in the Covenant. This position seems to be the most suitable one, taking specifically into account the concept set out in the Vienna Declaration and Programme of Action, namely, that all human rights are universal, indivisible, interdependent and interrelated, and shall be treated with the same emphasis. This is the solution adopted for the Optional Protocol to the International Covenant on Civil and Political Rights.

20. However, as a fall-back, the establishment of a system similar to that contained in the European Social Charter could be envisaged. This instrument gives States the possibility of choosing the set of rights in relation to which they admit the possibility of individual complaints. The protocol could even determine a minimum number of rights that shall be accepted by States parties.[3]

21. Portugal supports thus the possibility of presenting complaints in cases of violations of any of the rights consecrated in articles 1 to 15 of the Covenant (although it would accept an alternative position, similar to the one provided for in the framework of the European Social Charter).

22. Concerning the conditions for the admission of an individual complaint, the same rules as those applying to the Optional Protocol to the International Covenant on Civil and Political Rights should be adopted.

23. Concerning the possibility of the Committee ordering interim measures Portugal agrees with the solution which endorses the text of rule 86 of the internal rules of the Human Rights Committee consecrating the possibility of ordering interim measures with a view to avoiding an irreparable harm.[4]

24. The possibility of solving a dispute through friendly settlement with the State party concerned, which was also in article 28 (b) (2) of the European Convention on Human Rights, is an innovatory measure that is welcomed by Portugal. It makes possible a better relationship

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[3] It is worthy of note in this regard that Portugal accepted the possibility of individual complaints in relation to all the rights consecrated in the European Social Charter.

[4] This possibility was equally provided for in article 62, paragraph 2, of the American Charter of Human Rights.

between the victim and the State party. It is however important to underline that it is indispensable that the agreement reached be in full conformity with and respects the rights contained in the Covenant.

25. Concerning the time limit for a State to respond to the information it has received, the time limit of six months should be accepted, although some extension of this limit may be granted to States which are able to justify their request.

26. In matters relating to the examination of communications, it is the position of Portugal that no source of information should be excluded, provided that it is submitted by either one of the parties involved.

27. Portugal is equally of the opinion that the possibility of the same complaint being examined by another international body when the investigation or settlement procedure is prolonged could clash with the non bis in idem rule. For this reason, Portugal proposes the deletion of the last part of article 3.3 (b).

B. Comments of international organizations

International Monetary Fund

[Original: English]
[23 August 2000]

28. The International Monetary Fund indicated that it had no comments to submit on the report by the Committee on Economic, Social and Cultural Rights on a draft optional protocol for consideration of communications in relation to the Covenant.

World Bank

[Original: English]
[5 December 2000]

29. The World Bank stated that, in the light of the positive experience of the existing complaints procedures in the United Nations treaty system, as well as complaints procedures on economic, social and cultural rights at the regional level, a new procedure allowing individuals and groups to submit complaints concerning alleged violations of their economic, social and cultural rights as contained in the Covenant was welcome. The World Bank had no specific comments on the proposed text of the draft optional protocol.

Food and Agriculture Organization of the United Nations

[Original: English]
[28 August 2000]

30. The Food and Agriculture Organization of the United Nations (FAO) welcomes the proposal of the Committee on Economic, Social and Cultural Rights, which is a concrete

measure towards better implementation of economic, social and cultural rights, and recalls that the World Food Summit called in Objective 7.4 of the Plan of Action for better implementation of the rights related to food. The Organization notes the significant developments over the past two decades in the conceptualization of socio-economic rights and is firmly of the opinion that State obligations relating to the International Covenant on Economic, Social and Cultural Rights have now been clarified to such an extent that individual or group communications to the Committee should be possible and feasible.

31. FAO supports the sound proposals contained in the report of the Committee and urges the early negotiation of a final text for adoption and ratification by States parties to the Covenant. FAO takes the opportunity to draw attention to the "Report of the 25th session of the Committee on World Food Security" (Rome, 31 May-3 June 1999, FAO document CL 116/10), paragraph 4, in which the Committee welcomed General Comment No. 12 of the Committee on Economic, Social and Cultural Rights on the right to adequate food and the proposal that the cooperation between FAO and that Committee should be strengthened on a continuing basis.

C. Comments of non-governmental organizations

Centre on Housing Rights and Evictions

[Original: English]
[31 August 2000]

32. Regarding the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, the Centre on Housing Rights and Evictions (COHRE) generally agrees with the comments of the Committee on Economic, Social and Cultural Rights as contained in document E/CN.4/1997/105, paragraphs 17 to 22 and 24 to 31, with a slight modification to the proposed language found in paragraph 31.2.

33. Questions of terminology. COHRE agrees with the Committee's recommendation that the Protocol should refer to a "violation ... of ... the rights set forth in the International Covenant". This language mirrors that found in article 1 of the International Covenant on Civil and Political Rights and therefore reinforces the principle of indivisibility, interdependence and interrelatedness of the two sets of rights found in the International Covenants. COHRE therefore strongly disagrees with the conclusion of the Czech Republic that the two sets of rights are of a "different character", as well as with the Czech Republic's recommendation that the language should read "failure to ensure the satisfactory application of a provision of the Covenant" (E/CN.4/2000/49, para. 7). Also, the Committee's suggested language recognizes, contrary to the opinion of the Czech Republic, that Governments can violate rights enumerated in the International Covenant on Economic, Social and Cultural Rights. Just what constitutes a violation is a developing area of international law and the use of the term "violation" will surely result in jurisprudence that will further that development.

34. Individual and/or groups as complainants. COHRE agrees with the Committee that "an individual right to petition [is] essential" and that "groups should be included among those alleged victims entitled to submit complaints".

35. Range of the rights covered. COHRE agrees with the Committee that the optional protocol should cover all the substantive rights found in the Covenant (articles 1 to 15 inclusive), including the right to development found in article 1. COHRE also agrees with the majority of the Committee that prefers a comprehensive approach to the rights covered by the optional protocol. In other words, States parties would have to accept the petition procedure with regard to all the substantive rights in the Covenant rather than be able to opt in or opt out with regard to specific rights.

36. Protecting access to the procedure. Finally, COHRE agrees with the Committee that Governments must refrain from all acts of intimidation or reprisal against those persons or groups that submit or have submitted communications under the optional protocol. COHRE suggests strengthening the proposed language of the Committee, however, by the following paragraph:

> "State Parties to this Protocol shall not hinder in any way the effective exercise of the right to submit a communication and shall take all steps necessary to prevent any persecution or sanctioning of any person or group submitting or seeking to submit a communication under this Protocol."

37. COHRE hopes these comments are useful to the Committee in its deliberations towards the prompt adoption of an optional protocol.

International Anti-Poverty Law Center

[Original: English]
[21 October 2000]

38. Adoption of an optional protocol. The International Anti-Poverty Law Center (IAPLC) strongly supports the adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights. We concur with the reasons advanced by the Committee on Economic, Social and Cultural Rights in document A/CONF.157/PC/62/Add.5 (paras. 33-38). Specifically, we are of the opinion that an optional protocol would serve the following important and positive functions:

(a) Provide an occasion for individuals and groups to identify justiciable violations of economic, social and cultural rights, and an opportunity for the Committee on Economic, Social and Cultural Rights to clarify, through a developing jurisprudence, the nature of specific obligations of the Covenant. This process, in tandem with the creation of General Comments, would greatly strengthen the understanding of both States parties and individuals as to the rights and obligations entailed by the Covenant;

(b) Empower individuals to seek protection from abuses of economic, social and cultural rights by providing an international forum;

(c) Create more parity between the rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), in a long overdue step.

39. Omission of an inter-State complaint procedure. Neither the ICESCR nor the draft optional protocol contains a parallel provision to articles 41 and 42 of the ICCPR, which allow for States to raise issues of violations by other States. While not all States may be willing at this point to adopt a new procedure for the ICESCR that has been little used with regard to the ICCPR and other treaties that already contain it, we think it not impossible that at some point in the future the inter-State complaints procedure will be more fully implemented as a tool for human rights protection. In the interests of parity between economic, social and cultural rights, and civil and political rights standards, we suggest that an inter-State procedure be included in the optional protocol so that it be available if such a development should occur. We suggest however that the procedure might be included on an "opt-in" basis, allowing States to ratify the protocol without ratifying that particular provision. This would allow the provision to exist, even if unimplemented, until such time as it may find more currency in the international human rights system.

40. Protection of those submitting communications under the optional protocol. We are concerned that the wording of draft article 2.2 is unclear. We recommend the following alternative wording: "States Parties to this Protocol undertake not to hinder in any way the effective exercise of the right to submit a communication and to take all steps necessary to ensure that individuals or groups are not subjected to persecution or sanctioning as a consequence of communicating or seeking to communicate with the Committee under this Protocol."

41. Exhaustion of domestic remedies. The customary limitation on the requirement that all domestic remedies be exhausted appears to be missing from the draft optional protocol. We recommend that a phrase be added to draft article 3.3 (a) along the lines of the Committee's earlier draft, i.e., "unless the Committee considers that the application of this requirement would be unreasonable" (E/C.12/1994/12; also in the Utrecht Draft Article III (3) (a), as reported in Sim Special No. 18, "The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the ICESCR, held from 25-28 January 1995 in Utrecht"; and in the draft proposed by Kitty Arambulo in Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights (Intersentia/Hart 1999). Alternatively, we propose that language be added along the lines of article 4.1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women , i.e., "unless the application of such remedies is unusually prolonged or unlikely to bring effective relief".

42. Power to conduct independent inquiries. We tentatively recommend that the Committee be granted the power to undertake independent inquiries into "grave and systematic violations by a State party of rights set forth in the Covenant". This would parallel the powers granted to the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the International Convention on the Elimination of All Forms of Discrimination against Women. The existence of an independent inquiry power under the optional protocol should not however be seen as precluding any inquiry powers of the Committee in its regular role as oversight body for the Covenant (see discussion in Arambulo, cited above, p. 198), and further discussion on this issue would be warranted.

43. Scope of the protocol and reservations. We support the comprehensive approach to the scope of the protocol as described in paragraph 28 of the Committee's report, which precludes selective application of the protocol with regard to the various rights in the Covenant. We recommend that reservations to the optional protocol not be allowed except with regard to inter-State procedures and independent inquiries under the protocol.

Forum Menschenrechte

[Original: English]
[24 August 2000]

44. The Forum Menschenrechte, a union of 40 German NGOs, strongly supports the adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights.

45. This protocol will offer a more effective protection of individuals by the Committee on Economic, Social and Cultural Rights in cases where social and economic rights are in danger. In addition, it is important that the optional protocol include an "on-behalf" procedure, as in many cases individuals cannot defend their own interests owing to lack of resources. As far as possible, the protocol should take into account the rules of procedure of those treaty bodies with an existing complaints procedure, as well as the practices established by the treaty bodies' implied powers.

46. In light of the work of the Committee and of the latest scientific research, it is obvious that economic, social and cultural rights are as justiciable as civil and political rights. Those who argue against this are questioning one of the most important international agreements in the field of human rights, which is the indivisibility and interdependence of all human rights.

47. The Forum Menschenrechte welcomes the efforts made by the Committee and reminds the Commission on Human Rights that the question of a draft optional protocol has been discussed for nearly 10 years now and that the 1993 Vienna Declaration already included a request for the establishment of such a procedure.

American Association of Jurists and Centre Europe-Tiers Monde

[Original: Spanish]
[8 November 2000]

48. The draft optional protocol to the International Covenant on Economic, Social and Cultural Rights establishing a procedure for complaints to be submitted to the Committee on Economic, Social and Cultural Rights was adopted by the Committee in 1997 and submitted to the Commission on Human Rights in 1998. It is generally a good draft and its adoption and entry into force would be a major step forward in the protection of economic, social and cultural rights.

49. However, article 1, paragraph 1, of the draft states that complainants must be subject to the jurisdiction of the State against which the complaint was brought. This provisions closes the door of the procedure established by the draft to the victims of violations caused by decisions of a State which is not that of their nationality or residence or committed by a legal person (in public or private law) which is not subject to the same jurisdiction as the complainants, but whose decisions effect them.

50. In the discussions that took place in the Committee during the elaboration of the draft, the representative of the American Association of Jurists said that that provision was not reasonable, since the globalization of the economy means that all countries in the world are interrelated and mutually dependent and that the economic and social policies of one country or a group of countries may have a considerable economic and social impact on another country or group of countries and their inhabitants, so that it is now impossible to refer to the economic and social situation of one country in isolation from the international context. The persons or entities responsible for violations of the economic, social or cultural rights of individuals or groups may thus be subject to different national jurisdictions. The text of article 1, paragraph 1, of the draft is literally the same as article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, which is based on article 2 of the International Covenant on Civil and Political Rights. However, the International Covenant on Economic, Social and Cultural Rights, which should serve as a basis for the text of the draft optional protocol, does not refer to territory or jurisdiction.

51. Article 2 of that Covenant states only that each State "undertakes to take the steps, individually and through international assistance and cooperation". The text of article 1 of the first Optional Protocol and article 2 of the International Covenant on Civil and Political Rights have created considerable implementation problems for the Human Rights Committee precisely because article 2 of the Covenant restricts the obligations of States to respecting and ensuring human rights within their territory and subject to their jurisdiction and article 1 of the Optional Protocol restricts the right to claim that violations have been committed by a State to individuals subject to its jurisdiction.

52. In the exercise of its quasi-jurisdictional functions, the Human Rights Committee has found that, if article 2 of the Covenant and article 1 of the Optional Protocol were applied literally, persons turning to the Committee to complain of serious violations of their human rights would be deprived of protection.

53. To reach that conclusion, the Committee referred to article 1 of the Protocol, which states that the Committee may receive and consider communications from individuals subject to the jurisdiction of the State concerned, and thus interpreted jurisdiction as being personal (that is, derived from the victim's nationality, not from his country of residence) and not territorial. The Committee distinguished between personal and territorial jurisdiction because article 2 of the Covenant refers to jurisdiction and territory and the Protocol refers only to jurisdiction. The Committee also referred to article 5, paragraph 1, of the Covenant, which states that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant" and is thus a general rule for the interpretation of the Covenant. In 1993, the

Human Rights Committee referred again to this question as a result of events in the Former Yugoslavia and, during the consideration of the report of the Federal Republic of Yugoslavia (Serbia and Montenegro), the members of the Committee said that "States parties were responsible for the observance of human rights when their representatives were involved and when their acts affected human beings, even outside their national territory". It should be noted that reference was made to "human beings" not to "nationals".

54. In 1995, in its comments on the report of the United States of America, the Human Rights Committee stated: "The Committee does not share the view expressed by the Government (of the United States of America) that the Covenant lacks an extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State's territory" (CCPR/C/79/Add.50, 7 April 1995, para. 19). It can therefore be said that article 2 of the International Covenant on Civil and Political Rights establishes two types of obligations of States:

(i) The universal passive obligation to respect human rights everywhere and in all circumstances (with the exceptions provided for in article 4);

(ii) The active obligation to guarantee the enjoyment of such rights by all individuals within their territory and subject to their jurisdiction (the provision should read: "and/or subject to its jurisdiction" to cover cases of extraterritorial jurisdiction).

55. The words "subject to its jurisdiction" in article 1 of the first Optional Protocol to the International Covenant on Civil and Political Rights may apply only to the active obligation of States to guarantee the enjoyment of human rights, but, in the general context of the Covenant and, in particular, of the general interpretative rule contained in article 5, paragraph 1, and the current state of international human rights law, it can in no case apply to the universal passive obligation to respect human rights. The obligation to respect human rights is an obligation erga omnes and, when this obligation is not respected, the international community has a legitimate right to intervene through its relevant organs. How then can victims be deprived of the right of recourse to the appropriate bodies when they are not "subjects" of the State committing the violation?

56. None of the regional instruments which are similar to the International Covenant on Civil and Political Rights contains the limitation that the complainant must be subject to the jurisdiction of the State against which the complaint was brought (art. 44 of the American Convention on Human Rights, art. 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and art. 56 of the African Charter on Human and Peoples' Rights). The Protocol of San Salvador, a regional instrument similar to the International Covenant on Economic, Social and Cultural Rights, does not contain a limitation for the complainant in respect of jurisdiction (art. 19, para. 6). The Additional Protocol to the European Social Charter, which was adopted in November 1995 and entered into force on 1 July 1998, limits the jurisdiction requirement to national organizations. It obviously does not establish the requirement for international organizations.

57. It is therefore difficult to understand why a protocol to the International Covenant on Economic, Social and Cultural Rights should include a limitation which is not contained in the Covenant or in the similar regional American instrument, but which the European Protocol does contain, although it does not rule out international complaints submitted through international organizations, and which, although this limitation is provided for in the International Covenant on Civil and Political Rights and in the relevant protocol, the jurisprudence of the Human Rights Committee was not taken into account.

58. These considerations, formulated by the American Association of Jurists and the Centre Europe-Tiers Monde, are contained in the report by the Secretary-General (E/CN.4/1998/84).

The International Commission of Jurists and Habitat International Coalition

[Original: English]
[21 November 2000]

59. The International Commission of Jurists (ICJ) welcomes the opportunity to elaborate upon the comments which it submitted on the draft optional protocol in 1998 (see E/CN.4/1998/84). Habitat International Coalition (HIC) associates itself with the following comments of the ICJ.

60. The ICJ holds as a high priority the examination of ways in which to strengthen the implementation of economic, social and cultural rights. In the current context of globalization, economic, social and cultural rights have to be understood, more than ever, as an indivisible part of human rights and must be implemented as such. The indivisibility of human rights should lead to the recognition of the optimal justiciability of economic, social and cultural rights. At the international level, the adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights would constitute a major step in this direction by making it possible for individual and group complaints alleging violations of these rights to be submitted for examination by the Committee on Economic, Social and Cultural Rights.

61. The adoption of the draft optional protocol to the Covenant providing for a system for individual and group complaints is of great importance to ensure that persons and groups who are victims of violations of the most basic economic, social and cultural rights have access to an effective remedy at the international level and obtain the adequate reparation to which they are entitled. The adoption of an optional protocol was repeatedly recommended in the comments submitted on the issue of impunity of perpetrators of economic, social and cultural rights (see the report of the Secretary-General, E/CN.4/2000/91).

62. The ICJ is of the view that a system for the examination of individual and group cases offers the only real hope to move towards the development of a significant body of jurisprudence on the rights enshrined in the Covenant. Unfortunately, the proposal for the adoption of an optional protocol to the Covenant providing for a system of individual complaints has not, so far, received the support it deserves.

63. In order to try and remedy this situation, the ICJ organized in February 1999 a workshop on the draft optional protocol to the Covenant under the auspices of the Office of the High Commissioner for Human Rights in Geneva. Sixty-one representatives of 54 States and 11 NGO representatives participated in this half-day workshop, which provided a forum for as open and informal a discussion as possible on the draft optional protocol and on how best to solve the difficulties hampering progress on the consideration and adoption of this new instrument.

64. There was a general consensus among participants at the workshop in support of continuing work on the further elaboration of the optional protocol and of finding ways to keep the discussion going. A number of areas were, however, mentioned as needing further clarification.

65. It was pointed out that the justiciability of economic, social and cultural rights, which is increasingly acknowledged at the national level, ought to be acknowledged equally at the international level through the adoption of the optional protocol providing for the examination of individual and group cases.

66. Furthermore, States that have adhered, at the regional and the universal level, to mechanisms of individual or collective complaints such as those provided by the Protocol of San Salvador, the African Charter on Human and Peoples' Rights or the Additional Protocol to the European Social Charter providing for a system of collective complaints should support the adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights.

67. Finally, we draw your attention to the fact that the Office of the High Commissioner for Human Rights, in cooperation with the International Commission of Jurists, is organizing a workshop on the justiciability of economic, social and cultural rights, with a particular reference to the draft optional protocol to the Covenant, to be held on 5 and 6 February 2001 in Geneva.

Netherlands Institute of Human Rights

[Original: English]
[6 December 2000]

68. The Netherlands Institute of Human Rights (SIM) warmly supports the creation of an individual complaints procedure under the International Covenant on Economic Social and Cultural Rights, through an optional protocol. Over the years, SIM has taken a firm position on the desirability of such an optional protocol. In this respect, reference is made to, inter alia, SIM Special No. 18, "The Right to Complain about Economic, Social and Cultural Rights", edited by F. Coomans and F. van Hoof, in cooperation with K. Arambulo, J. Smith and B. Toebes (Utrecht, 1995).

II. COMMENTS ON THE REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

A. Comments of States

Mauritius

[Original: English]
[15 November 2000]

69. As regards the options which have been proposed by the High Commissioner for Human Rights, it is suggested that, in view of the limited number of replies received, another request be made to States, United Nations organs, intergovernmental organizations and non-governmental organizations for their comments on the draft optional protocol.

B. Comments of Non-Governmental Organizations

International Anti-Poverty Law Center

[Original: English]
[21 October 2000]

70. Options concerning further steps towards a draft optional protocol. The International Anti-Poverty Law Centre supports option (c) proposed in paragraph 32 of the High Commissioner's report. We believe that it is appropriate to move swiftly to begin discussion of the draft optional protocol, with a view to its eventual adoption.

American Association of Jurists and Centre Europe-Tiers Monde

[Original: Spanish]
[8 November 2000]

71. The American Association of Jurists and the Centre Europe-Tiers Monde thus support the resolution which the Sub-Commission on the Promotion and Protection of Human Rights adopted in August 2000 and in which it suggests that the Commission on Human Rights establish a working group entrusted with the further study of a draft optional protocol.

72. Such a Working Group will be able to remedy any remaining shortcomings in the draft, including that which was referred to above and is of fundamental importance, thus helping to ensure that the draft is adopted by the Commission on Human Rights and, later, by the General Assembly.

International Commission of Jurists

[Original: English]
[21 November 2000]

73. The ICJ welcomes the report of the High Commissioner for Human Rights on the draft optional protocol (E/CN.4/2000/49) and the submission by States of comments or new comments on the draft optional protocol during the course of the past year, to be added to those that had been submitted by States, NGOs and international organizations in previous years and in their majority supporting the adoption of the protocol.

74. We note that a considerable number of suggestions have been made regarding the provisions of the draft optional protocol and that further discussion of the text has been welcomed in various replies received from States. The ICJ believes that this constitutes an adequate and justified basis for the adoption of the proposal made in the High Commissioner's report in option (b), recommending that a further study of the draft optional protocol be carried out by an open-ended working group to be established by the Commission on Human Rights, as requested by the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-second session in its resolution 2000/9.